(1)

Supreme Court, U.S.
FILED

96 240 AUG 12 1996

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1996

Unigard Security Insurance Company,

Petitioner,

vs.

Raymond F. Bock, Jr., Personal Representative
of the Estate of Raymond F. Bock, M.D., deceased,
and Christopher E. Jobst, Personal Representative
of the Estate of Bernadette Bock, deceased,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Brian Michael Goodwin
Counsel of Record
Donald F. Froeb
Martin P. Clare
Lori V. Berke
MITTEN, GOODWIN & RAUP
3636 North Central
Suite 1200
Phoenix, Arizona 85012
(602) 650-2000

Counsel for Petitioner

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

56 pp

QUESTIONS PRESENTED

1. Whether an appellate court violates the Supreme Court's holding in *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995) when it raises the issue of discretionary jurisdiction *sua sponte*, conducts a *de novo* review of whether jurisdiction should have been exercised, vacates the judgment on the merits and orders dismissal, rather than remanding the case to the district court to address the issue of discretionary jurisdiction.

2. Whether an appellate court's pronouncement of a general rule precluding district courts from exercising discretionary jurisdiction over certain declaratory judgment actions pursuant to 28 U.S.C. § 2201 (namely insurance coverage actions presenting only issues of state law during the pendency of parallel proceedings in state court) violates the constitutional separation of powers by usurping Congress' legislative authority.

RULE 29.1 LIST OF CORPORATIONS RELATED TO PETITIONER UNIGARD SECURITY INSURANCE COMPANY

Parent Companies

Winterthur U.S. Holdings, a Delaware corporation.
*Unigard, Inc., a Washington corporation.

Subsidiaries (not including wholly owned subsidiaries)

None.

*The Bock insurance policy was written by Unigard Security Insurance Company. However, on December 10, 1993, as part of a sale transaction, its assets and liabilities related to continuing operations business were transferred to Unigard Insurance Company. Unigard, Inc. is the operating company of Unigard Insurance Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF CORPORATIONS RELATED TO PETITIONER UNIGARD SECURITY INSURANCE COMPANY ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. The Court of Appeals' Decision is a *De Novo* Review of the District Court's Acceptance of Discretionary Jurisdiction and is Directly Contrary to the Holding of the Supreme Court in *Wilton v. Seven Falls Co.* 6

II. The Court of Appeals' Pronouncement of a General Rule Violates the Constitutional Separation of Powers of Government by Usurping the Legislative Authority of Congress 10

TABLE OF CONTENTS (cont'd)

Page

III. The Supreme Court and Other Circuits Have Specifically Approved the Type of Declaratory Judgment Action Filed by Unigard in This Case 13

IV. Even if the General Rule Pronounced by the Court of Appeals is Valid, the Court of Appeals' Decision Was Erroneous 16

CONCLUSION 18

TABLE OF AUTHORITIES

Case — *Page*

Aetna Cas. and Surety Co. v. Merritt,
974 F.2d 1196 (9th Cir. 1992) 16

Allstate Ins. Co. v. Green,
825 F.2d 1061 (6th Cir. 1987) 8, 9, 15

American National Fire Ins. Co. v. Hungerford,
53 F.3d 1012 (9th Cir. 1995) . . 4, 5, 6, 7, 15, 16, 17, 18

American States Ins. Co. v. D'Atri,
375 F.2d 761 (6th Cir. 1967) 15

American States Ins. Co. v. Kearns,
15 F.3d 142 (9th Cir. 1994) 9, 15

Brillhart v. Excess Ins. Co. of America,
316 U.S. 491, 62 S.Ct. 1173 (1942) 8, 13, 14

Cincinnati Ins. Co. v. Holbrook,
867 F.2d 1330 (11th Cir. 1989) 15

Continental Cas. Co. v. Robsac Ind.,
947 F.2d 1367 (9th Cir. 1991)
(Hall, J., dissenting) 12

Ebert v. Poston,
266 U.S. 548, 45 S.Ct. 188 (1925) 11

TABLE OF AUTHORITIES (cont'd)

Case

Employers Reinsurance Corporation v. Karussos,
65 F.3d 796 (9th Cir. 1995) 4, 5, 7, 15, 16, 17, 18

First Options of Chicago, Inc. v. Kaplan,
115 S.Ct. 1920 (1995) 8

GNB Battery Technologies, Inc. v. Gould, Inc.,
65 F.3d 615 (7th Cir. 1995) 9

Gua Shan Co. v. Bankers Trust Co.,
956 F.2d 1349 (6th Cir. 1992) 12

Hanover Bank v. Commissioner of Internal Revenue,
369 U.S. 672, 82 S.Ct. 1080 (1962) 11

Jackson v. Culinary School of Washington, Ltd.,
59 F.3d 254 (D.C. Cir. 1995) 9

Maryland Cas. Co. v. Pacific Coal & Oil Co.,
312 U.S. 270, 61 S.Ct. 510 (1941) 13

McClellan v. Carland,
217 U.S. 268, 30 S.Ct. 501 (1910) 14

Nautilus Ins. Co. v. Winchester Homes,
15 F.3d 371 (4th Cir. 1994) 15

O'Donoghue v. United States,
289 U.S. 516, 53 S.Ct. 740 (1933) 10

Provident Tradesmens Bank and Trust Co. v. Patterson,
88 S.Ct. 733, 390 U.S. 102 (1968) 13

TABLE OF AUTHORITIES (cont'd)

Case

Rescue Army v. Municipal Court of Los Angeles,
331 U.S. 549, 67 S.Ct. 1409 (1947) 11, 19

Ryan v. Sea Air, Inc.,
902 F.Supp. 1064 (D. Alaska 1995) 9

Schnell v. Peter Eckrich & Sons, Inc.,
365 U.S. 260, 81 S.Ct. 557 (1961) 11

Scott v. Sanford,
60 U.S. 393 (1856) 10

Sears, Roebuck and Co. v. Zurich Ins. Co.,
422 F.2d 587 (7th Cir. 1970) 15

State Farm Fire & Cas. v. Mhoon,
31 F.3d 979 (10th Cir. 1994) 15

Universal Underwriters Ins. Co. v. McMahon Chevrolet Oldsmobile, Inc.,
866 F.2d 1060 (8th Cir. 1989) 15

USAA v. Morris,
154 Ariz. 113, 741 P.2d 246 (1987) 3

Wilton v. Seven Falls Co.,
115 S.Ct. 2137 (1995) . . . . . (i), 5, 6, 7, 8, 9
. . . . . 10, 12, 13, 14, 19

TABLE OF AUTHORITIES (Cont'd)

Rules, Regulations and Statutes

United States Code:

28 U.S.C. §§ 1254(1) 1

28 U.S.C. § 1331 11

28 U.S.C. § 1332 . . . . . 2, 11

28 U.S.C. § 1333 11

28 U.S.C. § 2201 . . . . . (i), 1, 11

Federal Rules of Civil Procedure:

F.R.Civ.P. 57 14

Arizona Revised Statutes:

A.R.S. § 12-1831, *et. seq.* 14

Unigard Security Insurance Company respectfully petitions for a writ of certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit in this case. Following a decision on the merits by the United States District Court for the District of Arizona, the Court of Appeals raised *sua sponte* the issue of whether the District Court erred in accepting jurisdiction of this declaratory judgment action, determined that the District Court did err, and remanded to the District Court with instructions to dismiss.

OPINIONS BELOW

The Memorandum order of the Court of Appeals (hereafter cited as Appendix A) is unreported. The Court of Appeals issued an unreported order denying a timely petition for rehearing and suggestion for rehearing *en banc*. (Appendix D). The July 31, 1995 Judgment of the United States District Court for the District of Arizona is also unreported. (Appendix C).

JURISDICTION

The Memorandum order of the United States Court of Appeals for the Ninth Circuit was filed on April 1, 1996. The Court of Appeals denied a timely petition for rehearing on May 14, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the application of 28 U.S.C. § 2201, the Declaratory Judgment Act. That statute provides in relevant part:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes

> other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Petitioner Unigard Security Insurance Company ("Unigard") filed a declaratory judgment action against Respondents Raymond F. Bock, Jr. ("Bock"), personal representative of the estate of Raymond F. Bock, M.D. and Christopher E. Jobst ("Jobst"), personal representative of the estate of Bernadette Bock, in the United States District Court for the District of Arizona, seeking a ruling that Unigard's policy of insurance did not provide coverage to the estate of Dr. Raymond F. Bock for claims made against it in a wrongful death action pending in state court. (Complaint attached as Appendix E). The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, Unigard being a citizen of Washington and Bock and Jobst citizens of Arizona.

Jobst was the plaintiff in the wrongful death action (as personal representative of the estate of Bernadette Bock) and the

estate of Dr. Raymond F. Bock was the defendant. In the Complaint, Jobst asserted negligence on the part of Dr. Bock as well as his intentional misconduct in causing the death of his wife, Bernadette Bock.[1] (App. E). Jobst further sought in the Complaint to have Dr. Bock declared to have pre-deceased Bernadette Bock and for an equitable ruling that Dr. Bock's estate not benefit from the murder. Unigard was not a party to the state court action. Moreover, the state court action did not raise any of the issues raised in the federal declaratory judgment action.

Unigard filed this declaratory judgment action on July 21, 1994. The wrongful death action that was pending in state court was settled on November 3, 1994, pursuant to a "Morris" agreement, after which judgment was entered against the estate of Dr. Raymond F. Bock.[2] On May 1, 1995, approximately six months after final resolution of the wrongful death action, Unigard filed a motion for summary judgment seeking a ruling from the District Court that there was no coverage. Bock and Jobst filed cross-motions for summary judgment seeking a ruling that there was coverage. The District Court denied Bock's and Jobst's motions, granted summary judgment in favor of Unigard and dismissed the case. (App. C).

Bock and Jobst appealed the District Court's ruling that

---

[1] The Tucson, Arizona Police Department concluded that Dr. Bock fatally shot Bernadette Bock and then fatally shot himself.

[2] The "Morris" Agreement derives its name from *USAA v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987). In a "Morris" Agreement, a defendant, whose insurance carrier has either denied coverage or reserved rights, will stipulate to have judgment entered against it while assigning all rights and claims it has against its carrier to the plaintiff. In this case, the defense and indemnification of part of the underlying action was tendered by the estate of Dr. Bock to Unigard under the policy. Unigard defended the entirety of that action under a reservation of rights, due in part to the fact that the household exclusion in its policy of insurance precluded coverage.

the household exclusion at issue in the Unigard policy was enforceable and precluded coverage. On March 4, 1996, after all parties had filed their appellate briefs, the Court of Appeals requested supplemental briefing by the parties on the question of whether the judgment should be vacated and the action dismissed as an improper acceptance of discretionary jurisdiction. (Appendix B).

This issue was not raised by any of the parties. Indeed, the issue was raised *sua sponte* by the Court of Appeals. The specific question posed to the parties by the Court of Appeals was:

> [W]hether the district court's judgment should be vacated and the case remanded to the district court with instructions to dismiss pursuant to *Employers Reinsurance Corporation v. Karussos*, 65 F.3d 796 (9th Cir. 1995) and *American National Fire Insurance Company v. Hungerford*, 53 F.3d 1012 (9th Cir. 1995).

(*Id.*).

On April 1, 1996, following supplemental briefing by the parties, and without ever reaching the merits of the appeal, the Court of Appeals ruled that the District Court should not have accepted discretionary jurisdiction of the case, and remanded to the District Court with instructions to dismiss.[3] (App. A). The Court of Appeals explained its decision in an unpublished Order which read:

> Federal '[c]ourts should generally decline to

---

[3] By the time the Ninth Circuit made its decision, the parties had collectively expended over $42,000 in costs and fees, after which the Court of Appeals declared the action to be a nullity.

> assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court.' *American National Fire Insurance Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995) . . . . We conclude that there are no 'circumstances present to warrant an exception to the general rule that the action belongs in state rather than federal court.' *Employers Reinsurance Corporation v. Karussos*, 65 F.3d 796, 799 (9th Cir. 1995)
> . . . .

(*Id.*) Unigard timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On May 14, 1996, the Court of Appeals denied Unigard's petition. (App. D).

REASONS FOR GRANTING THE PETITION

The Declaratory Judgment Act empowered federal courts to exercise their discretion to accept or reject jurisdiction of declaratory judgment actions. Prior to the Court of Appeals' decision in this case, the Supreme Court held in no uncertain terms in *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995) (copy attached as Appendix F) that the district courts possess discretion in the first instance to determine whether and when to entertain an action under the Declaratory Judgment Act and that district courts' decisions are to be reviewed for abuse of discretion, and not *de novo*. Notwithstanding, the Court of Appeals for the Ninth Circuit did not permit the District Court to explain its basis for accepting jurisdiction of this declaratory judgment action and reviewed the District Court's acceptance of jurisdiction *de novo*.

The Declaratory Judgment Act identifies three types of cases over which the federal court cannot accept jurisdiction.

Insurance coverage cases, including those commenced during the pendency of parallel proceedings in state court, is not one of them. Moreover, the Supreme Court has approved the use of federal declaratory judgment actions by insurers for the purpose of determining an insurer's liability when a tort action is pending against its insured in a state court. (*See* Section III, *infra.*) Notwithstanding, the Court of Appeals for the Ninth Circuit pronounced in this case a general rule precluding district courts from exercising their discretion to accept jurisdiction of insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in the state court.[4] The Court of Appeals' decision violates the constitutional separation of powers of government by usurping the legislative authority of Congress.

For the foregoing reasons, the decision below is erroneous. Moreover, the issues addressed in this petition are important and the need for guidance to the Court of Appeals on these issues is acute. Unigard's petition should be granted.

I. The Court of Appeals' Decision is a *De Novo* Review of the District Court's Acceptance of Discretionary Jurisdiction and is Directly Contrary to the Holding of the Supreme Court in *Wilton v. Seven Falls Co.*

Approximately one year prior to the decision of the Court of Appeals in this case, the Supreme Court rendered a review of district court jurisdiction as it relates to actions for declaratory relief. *See Wilton v. Seven Falls Co.*, 115 S.Ct.

---

[4] In fact, in *American National Fire Ins. Co. v. Hungerford*, 53 F.3d 1012 (1994), the Ninth Circuit held that the existence of actual ongoing parallel state court proceedings were not necessary as long as declaratory relief was merely available in a state court action.

2137 (1995). (App. F). *Wilton* squarely addressed one of the two questions which is at the core of this case: Where discretion to hear a declaratory judgment action is involved, is the proper standard of review by the court of appeals *de novo* or abuse of discretion? *Wilton* held that the proper standard of review is abuse of discretion, and not *de novo*. 115 S.Ct. at 2144. In the present case, the Court of Appeals for the Ninth Circuit reviewed the District Court's acceptance of jurisdiction *de novo*, thereby divesting the District Court of its discretion under the Declaratory Judgment Act. The Judgment rendered by the Court of Appeals is directly contrary to *Wilton* and is erroneous.

The unpublished and non-precedential decision of the Court of Appeals does not expressly state that review of the District Court's acceptance of jurisdiction was conducted *de novo*. Nevertheless, it was necessarily *de novo* inasmuch as there was no express ruling by the District Court upon the propriety of accepting jurisdiction of the case and the record of the District Court proceedings was devoid of any indication that the District Court otherwise considered the propriety of accepting jurisdiction. Moreover, instead of remanding the case to the District Court for such a determination, the Court of Appeals declared a general rule that federal courts should "decline to assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court," concluded that "there are no 'circumstances present to warrant an exception to the general rule that the action belongs in state rather than federal court'," and ordered that the action be dismissed.[5]

---

[5] According to the Ninth Circuit decision in *Employers Reinsurance Corp. v. Karussos*, the time at which district courts are to either accept or reject discretionary jurisdiction of declaratory judgment actions is at the time the action is commenced. 65 F.3d at 799. Unigard commenced the present action on July 21, 1994. *Karussos* and *Hungerford*, the cases upon which the Court of Appeals based its decision to dismiss the judgment of the District Court and remand with instructions to dismiss, were not decided until approximately one

(App. A).

In rejecting the very same conduct undertaken by the Ninth Circuit *sub judice*, the Court in *Wilton* held that *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173 (1942) makes clear that it is the district courts that are vested with the discretion to determine whether and when to entertain an action under the Declaratory Judgment Act, and not the courts of appeals. *Wilton* at 2140. The Supreme Court stated:

> We believe it more consistent with the [Declaratory Judgment Act] to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp. . . ."[T]he reviewing attitude that a court of appeals takes toward a district court decision should depend upon 'the respective institutional advantages of trial and appellate courts.'"

115 S.Ct. at 2144 (quoting in part *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920, 1926 (1995)). The institutional advantages of vesting discretionary decision making with the district courts are clear. The questions raised by the Complaint, the presence or absence of parallel state proceedings, the judicial economy involved, and other factors are best addressed by

---

year later. In fact, *Karussos* was decided on September 13, 1995, after the District Court granted judgment in favor of Unigard and dismissed the case. Because these cases did not exist at the time the present litigation was commenced, the District Court cannot be faulted for exercising jurisdiction over this case in the manner it did. Moreover, one day after the earliest of these two Ninth Circuit cases was decided, Unigard filed its dispositive motion for summary judgment, thus marking the end stage of litigation before the District Court.

district rather than appellate courts. *See Allstate Ins. Co. v. Green*, 825 F.2d 1061, 1065 (6th Cir. 1987) (holding that "the existence of a 'parallel' state court proceeding is a question to be determined specifically by the district court; the mere existence of a state court proceeding is not determinative of improper federal encroachment upon state court jurisdiction"); *see also Ryan v. Sea Air, Inc.*, 902 F.Supp. 1064, 1068 (D. Alaska 1995) (stating that "[o]ne of the reasons for having trial judges exercise discretion regarding the grant or withholding of declaratory relief is that they are in the best position to understand their respective case loads and that of their counterparts in the state system"). The District Court did not consider these factors, or if it did, it did not make written findings when it ruled on the merits. In either case, the review by the Court of Appeals was *de novo*.

In light of *Wilton*, the appropriate action for a court of appeals to take when a district court hears a declaratory judgment action but fails to explain its reasons for accepting jurisdiction, is either to remand to the district court for the district court to expressly determine the propriety of accepting jurisdiction of the action or decline review of the district court's acceptance of jurisdiction and review the case on its merits. *See American States Ins. Co. v. Kearns*, 15 F.3d 142 (9th Cir. 1994) (remanding for the district court to exercise its discretion in deciding whether to accept jurisdiction of a declaratory judgment action "because there was no clear decision on this issue by the district court"); *see also Jackson v. Culinary School of Washington, Ltd.*, 59 F.3d 254 (D.C. Cir. 1995) (holding that under *Wilton*, a remand was necessary so that the district court would have an opportunity to exercise its discretion and the court of appeals could then have the ability to meaningfully review the decision for abuse of discretion); *see also Green*, 825 F.2d at 1065 (holding that a district court's grant or denial of declaratory relief must be predicated on an exercise of its discretion after full inquiry into all relevant considerations, and ordering remand where record contained no indication that the district court made

such inquiry); *see also GNB Battery Technologies, Inc. v. Gould, Inc.*, 65 F.3d 615 (7th Cir. 1995) (proceeding to review case on its merits where the district court expressed no reservation about the propriety of entertaining the declaratory relief action and "detected no attempt to invoke artificially its jurisdiction to decide a controversy that was more academic than immediate").

The Court of Appeals for the Ninth Circuit violated *Wilton* in the present case when it did neither of the above, and instead reviewed the matter *de novo*. The Court of Appeals' decision in this case is in direct conflict with the Supreme Court's holding in *Wilton v. Seven Falls Co.* and is erroneous. This Court should grant Unigard's petition to prevent the Ninth Circuit from divesting the district courts of their discretion under the Declaratory Judgment Act.

II. The Court of Appeals' Pronouncement of a General Rule Violates the Constitutional Separation of Powers of Government by Usurping the Legislative Authority of Congress.

Although Unigard recognizes that courts of appeals may exercise broad authority to adjudicate cases and superintend district courts by enacting rules, in this case, the Court of Appeals for the Ninth Circuit exceeded its authority and impinged upon the legislative authority of Congress.

In the American Constitutional system, governmental powers are divided among the three separate departments of government. *O'Donoghue v. United States*, 289 U.S. 516, 530, 53 S.Ct. 740, 743 (1933). The principle of separation of the powers of government operates in a broad manner to confine legislative powers to the legislature, executive powers to the executive branch, and judicial powers to the judiciary. *Scott v. Sanford*, 60 U.S. 393 (1856). The purpose of the separation of

powers is to preclude commingling of the separate powers of government in the same hands. *O'Donoghue*, 289 U.S. at 530, 53 S.Ct. at 743. This Court has stated that if government is to function constitutionally, it is necessary for each of the branches to keep within its power. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 571, 67 S.Ct. 1409, 1421 (1947). These constitutional restraints are abused when one department of government attempts to exercise powers exclusively delegated to another, such as the Court of Appeals did in this case.

A fundamental principle, scrupulously observed by the courts, is that the judiciary may not encroach upon the functions of the legislature. *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262, 81 S.Ct. 557, 559 (1961). Courts will not encroach upon the legislative domain by judicial abridgement, alteration or repeal of legislative enactments. *See Ebert v. Poston*, 266 U.S. 548, 45 S.Ct. 188 (1925). Courts cannot add words of limitation to a statute expressed in general terms. If there is to be a departure from the literal meaning of statutory language, it may be accomplished only by legislative action, not by judicial construction. *Hanover Bank v. Commissioner of Internal Revenue*, 369 U.S. 672, 687-88, 82 S.Ct. 1080, 1089 (1962).

Congress has addressed the types of cases that should be heard by the federal courts. For example, Congress has determined that the federal courts shall hear cases involving federal questions, cases involving citizens of different states where the amount in controversy exceeds $50,000 and cases involving admiralty or maritime law. *See* 28 U.S.C. §§ 1331-33. In addition, Congress conferred upon the federal courts broad authority to hear all categories of declaratory judgment actions, with only three exceptions, none of which are relevant here. 28 U.S.C. § 2201(a).

In this case, the Court of Appeals for the Ninth Circuit

imposed a fourth limitation upon the district courts' authority to hear declaratory relief actions. The category is "insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings[6] in state court." Although the Court qualifies its rule with the word "generally," "the reality is that the [Court of Appeals] has established a per se rule against Federal District Courts taking jurisdiction over declaratory judgment actions brought by insurers. . . . [The Court of Appeals] leaves the district courts no room to exercise their discretion," as intended by Congress under the Declaratory Judgment Act. *Continental Cas. Co. v. Robsac Ind.*, 947 F.2d 1367, 1377-78 (9th Cir. 1991) (Hall, J., dissenting).

The Court of Appeals' disqualification of an additional category of cases otherwise within the plain scope of the Declaratory Judgment Act constitutes a rewriting of the Declaratory Judgment Act in violation of the constitutional principle of separation of powers. The Court of Appeals' decision in this case impinges on the role of the legislative branch and usurps its authority. This Court should grant Unigard's petition to preserve the important principle of separation of the powers of government.

---

[6] For purposes of this discussion only, Unigard assumes that in the present case there were "parallel proceedings pending in state court." However, Unigard maintains that the Court of Appeals erred in characterizing the Arizona Superior Court case of *Jobst v. Estate of Bock* as "parallel proceedings." Parallel proceedings, by definition, involve the same parties and the same issues. *Gua Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992) (appeal dismissed after remand on other grounds). This Court correctly concluded in *Wilton* that the state and federal proceedings were parallel, as both proceedings involved the same parties and the same issues. In the present case, Unigard was not a party to the state court action, and the state court action did not involve the issue of coverage. Accordingly, the state and federal proceedings were not parallel.

III. The Supreme Court And Other Circuits Have Specifically Approved the Type of Declaratory Judgment Action Filed by Unigard in This Case.

The Supreme Court has specifically approved the use of declaratory judgment actions by insurers to determine their liability when a tort action is pending against their insured in state court. *See, e.g., Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510 (1941); *see also Provident Tradesmens Bank and Trust Co. v. Patterson*, 88 S.Ct. 733, 390 U.S. 102 (1968) (holding that the federal court should not have denied relief in an action for a declaratory judgment when contemporaneous state tort actions did not involve all of the issues raised by the declaratory judgment action). Notwithstanding, the Court of Appeals pronounced its general rule and ordered that this action be dismissed.

In *Wilton*, this Court held that the preferred practice in cases where an insurer has filed a declaratory judgment action in federal court to determine its liability when a tort action is pending against its insured in state court is to issue a stay pending resolution of the state court proceeding, not to dismiss the case. 115 S.Ct. 2137, 2143, n.2. In this case, a stay was never a consideration because as earlier noted, the proceedings in the Arizona court were finally resolved at the time the parties moved for summary judgment, and in any event, those proceedings did not involve Unigard or coverage issues.

The only situation in which the Supreme Court has suggested that a district court should abstain from hearing a declaratory judgment action is where another suit is pending in a state court presenting the same issues between the same parties. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494-495,

62 S.Ct. 1173, 1175-76 (1942).[7] Notwithstanding, the Supreme Court emphasized that, even in the above-described situation, the decision to abstain rests with the district court in the first instance, and not the court of appeals. *Id.*

The state court action in the present case did not present the same issues as the federal declaratory judgment action, and Unigard was not a party to the state court action. Accordingly, even had this Court intended that its suggestion in *Brillhart* be a rule of law to be followed by the lower courts, its rule of law was inapplicable in this case.

Federal Rule of Civil Procedure 57 also illuminates the error made by the Court of Appeals. That Rule provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Thus, even though Arizona has its own declaratory judgment procedure,[8] Unigard was not precluded from seeking declaratory relief under the federal Declaratory Judgment Act. To hold otherwise negates the very import of Rule 57.

Moreover, this Court has expressly stated that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Wilton*, 115 S.Ct. at 2141 (quoting *McClellan v. Carland*, 217 U.S. 268, 282, 30 S.Ct. 501, 505 (1910)). It follows that the existence of a state statute under which an insurer may sue for declaratory judgment in state court should have little weight in the determination as to whether the federal court should accept jurisdiction of a particular declaratory relief action. Notwithstanding, the Court of Appeals for the Ninth

---

[7] This suggestion was not part of the Court's holding and therefore is not a rule of law.

[8] A.R.S. § 12-1831, *et seq.*

Circuit has taken the view that if an insurer could sue for declaratory judgment in state court, then a federal court abuses its discretion if it entertains such an action. *See Hungerford, supra*, and *Karussos, supra*. Such view is erroneous.

Like the Supreme Court, several circuits have specifically approved the use of declaratory judgments in cases like the present one. *See e.g. Nautilus Ins. Co. v. Winchester Homes*, 15 F.3d 371 (4th Cir. 1994); *see also Allstate Ins. Co. v. Green*, 825 F.2d 1061 (6th Cir. 1987); *see also Sears, Roebuck and Co. v. Zurich Ins. Co.*, 422 F.2d 587 (7th Cir. 1970); *see also Universal Underwriters Ins. Co. v. McMahon Chevrolet-Oldsmobile, Inc.*, 866 F.2d 1060 (8th Cir. 1989); *see also State Farm Fire & Cas. v. Mhoon*, 31 F.3d 979 (10th Cir. 1994); *see also Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330 (11th Cir. 1989). In fact, some circuits have expressly rejected the use of a rule such as that pronounced by the Court of Appeals panel in this case. *See American States Ins. Co. v. D'Atri*, 375 F.2d 761 (6th Cir. 1967) (holding that there is no *per se* rule against the district court entertaining a declaratory judgment action to determine an insurer's liability when a tort action is pending against its insured in state court). In *Nautilus Ins. Co.*, the United States Court of Appeals for the Fourth Circuit recognized, consistent with Unigard's argument, that "[s]uch a rule would, of course, be flatly inconsistent with controlling Supreme Court precedent . . . ." *Nautilus Ins. Co.*, 15 F.3d at 376.

Finally, it is important to recognize that there is a split of authority, even within the Ninth Circuit, on whether the District Court acted properly in the present lawsuit. A different panel of the Court of Appeals for the Ninth Circuit rejected the rule pronounced by the panel in the present case. In *American States Ins. Co. v. Kearns*, the Court of Appeals held that "there is no *per se* rule against the district court exercising its jurisdiction to resolve an insurance coverage dispute when the

underlying liability suit is pending in state court." 15 F.3d 142 (9th Cir. 1994) (relying upon *Aetna Cas. and Surety Co. v. Merritt*, 974 F.2d 1196, 1199 (9th Cir. 1992)).

The Court of Appeals' decision in this case constitutes a significant departure from the accepted and usual course of federal judicial proceedings. It is an erroneous decision. Unigard's petition should be granted and the decision of the Ninth Circuit reversed.

IV. Even if the General Rule Pronounced by the Court of Appeals is Valid, the Court of Appeals' Decision was Erroneous

Even if the Court of Appeals had the legal authority to pronounce a general rule precluding district courts from exercising discretionary jurisdiction over certain declaratory judgment actions, under the specific facts of this case, discretionary jurisdiction was properly exercised by the District Court and therefore the Court of Appeals' decision in this case was erroneous. This is further reason for Unigard's petition to be granted and the Court of Appeals' Order to be vacated.

Neither *American National Fire Ins. Co. v. Hungerford* 53 F.3d 1012 (9th Cir. 1995) nor *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995), the two cases upon which the Court of Appeals relied in rendering its decision, precluded the District Court from exercising jurisdiction over the present case. To support its decision in *Hungerford*, the Ninth Circuit cited to its "policies of avoiding rendering opinions based on pure hypothetical factual scenarios, discouraging forum shopping, encouraging parties to pursue the most appropriate remedy for their grievances, preserving precious judicial resources and promoting comity." *Hungerford*, 53 F.3d at 1019. These concerns are, for the most part, absent in the present action.

First, there was no "hypothetical factual scenario." The facts in the present case were not in dispute. The parties had conceded by their cross-motions that what was required was an application of law to a set of plain and clear facts. Unlike *Hungerford* (and *Karussos* for that matter), resolution of the declaratory judgment action would not have resulted in the parties going back to a state court action for application of the court's ruling. This declaratory judgment action was an end point, not an intermediate step.

Moreover, the issues present in this declaratory judgment action were whether the language in Unigard's homeowner's policy was clear and unambiguous; whether the household exclusion violated public policy; and whether the insured had a reasonable expectation that differed with the clear and unambiguous policy language. None of these issues were present in the state court wrongful death action and none were relevant to that action.

Unigard did not forum shop in this case. At the time this declaratory judgment action was commenced (and at present), Unigard had the right to bring the action in federal court. There was no objection to the forum or to the District Court's jurisdiction.[9]

Encouraging the parties to pursue the most appropriate remedy for the grievance was not an issue. The most appropriate remedy for Unigard, indeed its only remedy, was declaratory relief. Unigard requested nothing more and received nothing more from the District Court.

---

[9] To suggest that *Hungerford* constituted fair notice that the District Court should have, on its own, reviewed its discretionary jurisdiction, especially when that decision was filed only one day prior to Unigard's filing of its Motion for Summary Judgment, is nonsense.

Resort to the federal forum (as opposed to the state forum) neither preserved nor depleted precious judicial resources. The coverage dispute needed to be resolved regardless of the forum selected. The judicial resources expended to reach that resolution would have been the same, regardless of forum. Unlike *Hungerford* and *Karussos*, there was no vibrant, ongoing parallel proceeding to the present action which might have led to a conservation of resources.[10]

The final concern of the *Hungerford* court was comity. In the present action, however, comity was not an issue. In the present action, the District Court merely applied Arizona law directly on point. It was not called upon to interpret Arizona law. It was not called upon to predict what Arizona law would be.

When one considers the significantly different procedural posture of this case when compared to that in *Hungerford* and *Karussos*, the Court should recognize that the concerns raised by the Ninth Circuit in those cases with regard to the district courts' discretionary jurisdiction were not implicated here. This was a case in which the federal court's discretionary jurisdiction was properly invoked and in which that jurisdiction should be upheld.

CONCLUSION

The Court of Appeals employed improper judicial procedure in this case in violation of *Wilton* when it refused to permit the District Court to exercise its own discretion in deciding whether to hear this action for declaratory relief under the Declaratory Judgment Act, and usurped the legislative

---

[10] When one considers the expense to all parties that was incurred prior to the Ninth Circuit's order dismissing the action without resolution, it is clear that the Ninth Circuit was supporting a waste of resources, not a preservation of them.

authority of Congress. This Court has recognized the importance of vesting the district courts with discretion in the first instance to determine the propriety of hearing declaratory judgment actions. *Wilton, supra*. A decision by this Court is necessary to prevent the Court of Appeals for the Ninth Circuit from divesting the district courts of that discretion. This Court has also recognized the importance of preserving the principle of separation of the powers of government. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 571, 67 S.Ct. 1409, 1421 (1947). A decision by this Court would foster preservation of this important Constitution-based principle.

The public importance of the questions presented by Unigard is great and this petition should be granted.

RESPECTFULLY SUBMITTED, August 9, 1996.

Brian Michael Goodwin
Counsel of Record
Donald F. Froeb
Martin P. Clare
Lori V. Berke
MITTEN, GOODWIN & RAUP
3636 North Central Avenue
Suite 1200
Phoenix, Arizona 85012
(602) 650-2000

Counsel for Petitioner

TABLE OF CONTENTS TO APPENDICES

A - 1 Memorandum order of United States Court of Appeals for the Ninth Circuit (April 1, 1996)

B - 1 Order of United States Court of Appeals for the Ninth Circuit requesting supplemental briefs (March 4, 1996)

C - 1 Judgment of United States District Court for the District of Arizona (July 31, 1995)

D - 1 Order of United States Court of Appeals for the Ninth Circuit denying petition for rehearing (May 14, 1996)

E - 1 Complaint

F - 1 *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNIGARD SECURITY INSURANCE COMPANY, a Washington corporation, Plaintiff-Appellee, v. RAYMOND F. BOCK, JR., personal representative of the estate of Raymond F. Bock, M.D., deceased, Defendant-Appellant.	No. 95-16662 D.C. No. CV-94-00492-JMR
UNIGARD SECURITY INSURANCE COMPANY, a Washington corporation, Plaintiff-Appellee, v. RAYMOND F. BOCK, JR., Defendant, and CHRISTOPHER E. JOBST,	No. 95-16663 D.C. No. CV-94-00492-JMR

personal representative of the estate of Bernadette Bock, deceased,

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Submitted March 26, 1996**

Before: GOODWIN, WIGGINS and O'SCANNLAIN, Circuit Judges.

Christopher E. Jobst and Raymond F. Bock, Jr. appeal the district court's summary judgment in favor of Unigard Security Insurance Company in Unigard's diversity action seeking a declaratory judgment that Unigard was not required to defend Jobst and Bock in an underlying state court action. Federal "[c]ourts should generally decline to assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court." American National Fire Insurance Co. v. Hungerford, 53 F.3d 1012, 1019 (9th Cir. 1995) (citation and internal quotation marks omitted). We conclude that there are no "circumstances present to warrant an exception to the general rule that the action belongs in state rather than federal court." See Employers Reinsurance Corp. v. Karussos, 65 F.3d 796, 799 (9th Cir. 1995) (citation and internal quotation marks omitted).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

We therefore vacate the district court's grant of summary judgment and remand with instructions to dismiss Unigard's complaint.

VACATED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNIGARD SECURITY INSURANCE COMPANY, a Washington corporation,	)	No. 95-16662 95-16663
Plaintiff-Appellee,	)	D.C. No. CV-94-00492-JMR District of Arizona (Tucson)
v.	)	ORDER
RAYMOND F. BOCK, JR.,	)	
Defendant-Appellant.	)	

On or before March 12, 1996, the parties shall file with the Clerk supplemental briefs of not more than five pages addressing the following issue: whether the district court's judgment should be vacated and the case remanded to the district court with instructions to dismiss pursuant to Employers Reinsurance Corp. v. Karussos, 65 F.3d 796 (9th Cir. 1995) and American National Fire Insurance Co. v. Hungerford, 53 F.3d 1012 (9th Cir. 1995).

FOR THE COURT:

/s/_____
Paul Keller
Senior Case Management Attorney/Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNIGARD SECURITY INSURANCE,	)	
	)	**JUDGMENT IN A**
Plaintiff,	)	**CIVIL CASE**
vs.	)	
RAYMOND BOCK, ET AL.,	)	Case No. CV 94-492 T-JMR
Defendants.	)	

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX **DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that Unigard's May 1, 1995 Motion For Summary Judgment is **GRANTED.**

IT IS FURTHER ORDERED, that Defendant Jobst's May 25, 1995 Cross-Motion For Summary Judgment is **DENIED.**

IT IS FURTHER ORDERED that Defendant Bock's May 26, 1995 Cross-Motion For Summary Judgment is **DENIED.**

IT IS FURTHER ORDERED, that this case is **DISMISSED.**

JULY 31, 1995 — s/ RICHARD H. WEARE

Date — CLERK

/s/

(By) Deputy Clerk/Marilyn Hardeman

COPIES TO: CLARE, GOODWIN, RUBIN, ORD. BK., JMR

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

(CIVIL ORDER--GENERAL)

Civil Case No. CV 94-492 TUC JMR Date: JULY 28, 1995
Title UNIGARD SECURITY INSURANCE v. BOCK, et al.,

==========
==========

HONORABLE JOHN M. ROLL

==========

Under advisement following a hearing are cross-motions for summary judgment in this declaratory judgment action. Plaintiff moves for summary judgment asserting that the household exclusion in Bock's policy precludes coverage. Defendants claim the exclusion clause is invalid under the reasonable expectations doctrine.

Although substantial authority exists indicating that household exclusions are invalid as a derogation of an insured's reasonable expectations, those decisions involve auto insurance policies. See State Farm Mut. Auto. Ins. Co. v. Falness, 39 F.3d 966 (9th Cir. 1994); Averett v. Farmers Ins. Co. of Ariz., 177 Ariz. 531 (1994); Do by Minker v. Farmers Ins. Co. of Ariz., 171 Ariz. 113 (App. 1992); State Farm Mut. Auto. Ins. Co. v. Dimmer, 160 Ariz. 453 (App. 1989).

The Arizona Supreme Court has not ruled on the validity of a household exclusion in the context of a homeowner's policy. The only Arizona opinion expressly upholding a household exclusion in a homeowner's policy is a decision by the Arizona Court of Appeals. See State Farm Fire & Casualty Co. v. Powers, 163 Ariz. 213 (App. 1989).

Defendants claim Powers rests upon the Arizona Supreme Court's decision in Arceneaux v. State Farm Mut. Auto. Ins. Co., 113 Ariz. 216, and that Arceneaux was subsequently rejected. See Averett, 177 Ariz. 531. However, Arceneaux does

not speak to the validity of household exclusions generally but simply the relationship between contract terms and statutory requirements. See Arceneaux, 113 Ariz. at 218 ("[T]he contract of insurance here need provide for members of the household nothing more than the Act requires, and thereafter the exclusionary clause is viable."). Further, Powers does not rely on Arceneaux in its discussion of the reasonable expectations doctrine, but only for the principle that parties are "free to make their own contractual arrangement." Powers, 163 Ariz. at 216. Household exclusions in homeowner's policies retain vitality, subject to the doctrine of reasonable expectations. Powers, 163 Ariz. 213; Averett, 177 Ariz. 531. Accordingly,

IT IS HEREBY ORDERED that Unigard's May 1, 1995 motion for summary judgment is **GRANTED.**

IT IS FURTHER ORDERED that Defendant Jobst's May 25, 1995 cross-motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that Defendant Bock's May 26, 1995 cross-motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that this case is **DISMISSED.**

/s/
JOHN M. ROLL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNIGARD SECURITY INSURANCE COMPANY, a Washington corporation, Plaintiff-Appellee, v. RAYMOND F. BOCK, JR., personal representative of the estate of Raymond F. Bock, M.D., deceased, Defendant-Appellant.	No. 95-16662 D.C. No. CV-94-00492-JMR Arizona (Tucson)
UNIGARD SECURITY INSURANCE COMPANY, a Washington corporation, Plaintiff-Appellee, v. RAYMOND F. BOCK, JR., Defendant, and CHRISTOPHER E. JOBST, personal representative of the estate of Bernadette Bock,	No. 95-16663 D.C. No. CV-94-00492-JMR Arizona (Tucson) ORDER

deceased,)
)
Defendant-Appellant.)
)

Before: GOODWIN, WIGGINS, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

GUST ROSENFELD
201 N. Central Avenue, Suite 3300
Phoenix, Arizona 85073-3300
(602) 257-7422
Richard A. Segal - 000877

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNIGARD SECURITY INSURANCE COMPANY, a Washington corporation,	)
Plaintiff,	) No. CIV 94-492TUC JMR
v.	) COMPLAINT FOR) DECLARATORY JUDGMENT
RAYMOND F. BOCK, JR., personal representative of the estate of Raymond F. Bock, M.D., deceased; and CHRISTOPHER E. JOBST, personal representative of the estate of Bernadette Bock, deceased,	)
Defendants.	)

Unigard Security Insurance Company ("Unigard") alleges as follows:

1. This is an action between citizens of different states. The amount in controversy is not less than $100,000. The court has jurisdiction pursuant to 28 U.S.C. § 1332.

2. Unigard is a Washington corporation with its principal place of business in Washington. It is authorized to do business in the state of Arizona.

3. Defendants are residents of Pima County, Arizona. Raymond F. Bock, Jr. is the duly appointed personal representative of Raymond F. Bock, M.D., deceased. Christopher E. Jobst is the duly appointed personal representative of the estate of Bernadette Bock, deceased. Raymond F. Bock, M.D., deceased, will be referred to herein as "Bock, Sr." Bernadette Bock, deceased, will be referred to herein as "Bernadette".

4. On December 1, 1992, Unigard issued a homeowners policy, policy number UH 68189. The policy was in effect on May 21, 1993. The policy includes personal liability coverage for bodily injury or personal injury caused by an occurrence to which the coverage applies.

5. Bock, Sr. and Bernadette died on May 21, 1993 at their home in Tucson, Arizona. There were no witnesses to their deaths. Following an investigation the Tucson Police Department concluded that Bock, Sr. first shot Bernadette in the head and then shot himself in the head.

6. Bock, Sr. and Bernadette were husband and wife and residents of the same household at the time of their deaths.

7. Defendant Jobst, in his representative capacity, has filed an action in this court, No. C 300299, against the estate of Bock, Sr., for the wrongful death of Bernadette (the "Action"). Counsel for defendant Jobst has stated that the Action seeks damages in excess of $100,000.

8. The Action alleges alternatively that Bock, Sr. negligently killed Bernadette while he was without the mental capacity to act rationally, that Bock, Sr. killed Bernadette in violation of criminal homicide statutes, or that the conduct of Bock, Sr. in killing Bernadette was intentional.

9. Material portions of the insurance policy are as follows:

A. The definitions under the Agreement portion of the policy, p. 1, define "you" and "your" as referring to the "named insured" shown in the Declarations and the spouse if a resident of the same household. The named insured in the Declarations is Raymond F. Bock, Sr.

B. The exclusions under the personal liability coverage, p. 23, provide that personal liability coverage does not apply to "'bodily' to you or an 'insured' within the meaning of part a. or b. of 'insured', as defined." The definition of 'insured' p. 1, "means you and residents of your household who are . . . your relatives . . . ."

C. Personal liability coverage is provided for bodily injury caused by an "occurrence." "'Occurrence' means an accident." Policy, p. 2.

D. The exclusions to the personal liability coverage, p. 20, provide that personal liability coverage does not apply to "bodily injury" "resulting from an act or omission by or at the direction of any, 'insured' which is reasonably expected or intended to cause a loss."

E. The exclusions to the liability coverage, p. 22, provide that personal liability coverage does not apply to bodily injury "arising out of sexual molestation, corporal punishment or physical or mental abuse."

F. The exclusions to the liability coverage, p. 23, provide that personal liability coverage does not apply to "'bodily injury' caused by a violation of a penal law or ordinance committed by or with the knowledge or consent of any 'insured'".

10. As a spouse of the person named in the Declarations and a resident of the same household, Bernadette was a "named insured". Bernadette is excluded as a claimant because she was a

"named insured" and, as a resident of Bock, Sr.'s household and his relative, she was also an "insured". Because Bernadette's death was not an accident there was no covered occurrence. The death of Bernadette resulted from an act by Bock, Sr. which was reasonably expected or intended to cause a loss. The death of Bernadette was bodily injury that arose out of physical abuse. The death of Bernadette was a bodily injury caused by a violation of a penal law committed by Bock, Sr.

11. Due to one or more of the factors set forth in the preceding paragraph there is no liability insurance coverage for the death of Bernadette and no obligation of Unigard to defend the Action.

12. Despite the absence of liability insurance coverage, Unigard has provided a defense in the action subject to a reservation of rights.

13. Unigard is entitled to judgment declaring that it is not obligated to defend the estate of Bock, Sr. in the Action and that it is not obligated to pay any judgment rendered in the Action or in any action arising out of the death of Bernadette.

Wherefore, Unigard Security Insurance Company prays for declaratory judgment against defendants as alleged, for its costs and reasonable attorneys' fees incurred herein, and for such other and further relief as the court deems proper.

GUST ROSENFELD

By /s/_____
Richard A. Segal
Attorneys for Plaintiff

115 S.Ct. 2137
132 L.Ed.2d 214, 63 USLW 4544 (Cite as: 115 S.Ct. 2137)

Leslie WILTON, etc., et al., Petitioners
v.
SEVEN FALLS COMPANY et al.

No. 94-562.

Supreme Court of the United States

Argued March 27, 1995.

Decided June 12, 1995.

Underwriters sought declaratory judgment that their commercial liability insurance policies provided no coverage. The United States District Court for the Southern District of Texas, David Hittner, J., stayed action pending resolution of later-filed state court suit. Underwriters appealed. The Court of Appeals for the Fifth Circuit, W. Eugene Davis, Circuit Judge, 29 F.3d 623, affirmed in unpublished opinion, and case was then published in full. 41 F.3d 934. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) discretionary standard, not "exceptional circumstances" test, governs district court's decision to stay declaratory judgment action during parallel state court proceedings, and (2) district court decision about propriety of hearing declaratory judgment action is reviewed for abuse of discretion.

Affirmed.

Justice Breyer took no part in consideration or decision of case.

*2139 O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except BREYER, J., who took no part in the consideration or decision of the case.

Michael A. Orlando, Westmont, NJ, for petitioners.

Werner A. Powers, Dallas, TX, for respondents.

For U.S. Supreme Court briefs, see:

1995 WL 13178 (Pet.Brief)

1995 WL 62841 (Resp.Brief)

1995 WL 118742 (Reply.Brief)

For Transcript of Oral Argument See:

1995 WL 242271 (U.S.Oral.Arg.)

Justice O'CONNOR delivered the opinion of the Court.

[1] This case asks whether the discretionary standard set forth in Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), or the "exceptional circumstances" test developed in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), governs a district court's decision to stay a declaratory judgment action during the pendency of parallel state court proceedings, and under what standard of review a court of appeals should evaluate the district court's decision to do so.

I

In early 1992, a dispute between respondents (the Hill Group) and other parties over the ownership and operation of oil and gas properties in Winkler County, Texas, appeared likely to culminate in litigation. The Hill Group asked petitioners (London

Underwriters) [FN1] to provide them with coverage under several commercial liability insurance policies. London Underwriters refused to defend or indemnify the Hill Group in a letter dated July 31, 1992. In September 1992, after a 3-week trial, a Winkler County jury entered a verdict in excess of $100 million against the Hill Group on various state law claims.

FN1. For the sake of clarity, we adopt the Court of Appeals' manner of referencing the parties.

The Hill Group gave London Underwriters notice of the verdict in late November 1992. On December 9, 1992, London Underwriters filed suit in the United States District Court for the Southern District of Texas, basing jurisdiction upon diversity of citizenship under 28 U.S.C. § 1332. London Underwriters sought a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1988 ed., Supp. V), that their policies did not cover the Hill Group's liability for the Winkler County judgment. After negotiations with the Hill Group's counsel, London Underwriters voluntarily dismissed the action on January 22, 1993. London Underwriters did so, however, upon the express condition that the Hill Group give London Underwriters two weeks' notice if they decided to bring suit on the policy.

On February 23, 1993, the Hill Group notified London Underwriters of their intention to file such a suit in Travis County, Texas. London Underwriters refiled their declaratory judgment action in the Southern District of Texas on February 24, 1993. As promised, the Hill Group initiated an action against London Underwriters on March 26, 1993 in state court in Travis County. The Hill Group's codefendants in the Winkler County litigation joined in this suit and asserted claims against certain Texas insurers, thus rendering the parties nondiverse and the suit nonremovable.

On the same day that the Hill Group filed their Travis County action, they moved to dismiss or, in the alternative, to stay London Underwriters' federal declaratory judgment action.

After receiving submissions from the parties on the issue, the District Court entered a stay on June 30, 1993. The District Court observed that the state lawsuit pending in Travis County encompassed the same coverage issues raised in the declaratory judgment action and determined that a stay was warranted in order to avoid piecemeal litigation and to bar London Underwriters' attempts at forum shopping. London Underwriters filed a timely appeal. See Moses H. Cone Memorial Hospital, supra, at 10, ***2140** 103 S.Ct., at 933-934 (a district court's order staying federal proceedings in favor of pending state litigation is a "final decisio[n]" appealable under 28 U.S.C. § 1291).

The United States Court of Appeals for the Fifth Circuit affirmed in an unpublished opinion filed on July 29, 1994. Noting that under Circuit precedent, "[a] district court has broad discretion to grant (or decline to grant) declaratory judgment," Wilton v. Seven Falls Co., 41 F.3d 934, 935 (CA5 1994), citing Torch, Inc. v. LeBlanc, 947 F.2d 193, 194 (CA5 1991), the Court of Appeals did not require application of the test articulated in Colorado River, supra, and Moses H. Cone, supra, under which district courts must point to "exceptional circumstances" to justify staying or dismissing federal proceedings. Citing the interests in avoiding duplicative proceedings and forum shopping, the Court of Appeals reviewed the District Court's decision for abuse of discretion, and found none. Wilton, 41 F.3d, at 935.

We granted certiorari, 513 U.S. ---, 115 S.Ct. 571, 130 L.Ed.2d 488 (1994), to resolve circuit conflicts concerning the standard governing a district court's decision to stay a declaratory judgment action in favor of parallel state litigation, compare, e.g., Employers Ins. of Wausau v. Missouri Elec. Works, 23 F.3d. 1372, 1374, n. 3 (CA8 1994) (pursuant to Colorado River and Moses H. Cone, a district court may not stay or dismiss a declaratory judgment action absent "exceptional circumstances"); Lumbermens Mut. Casualty Co. v. Connecticut Bank & Trust, 806 F.2d 411, 413 (CA2 1986) (same), with Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc., 996 F.2d 774, 778, n. 12 (CA5 1993) (the "exceptional circumstances" test of Colorado

River and Moses H. Cone is inapplicable in declaratory judgment actions); Mitcheson v. Harris, 955 F.2d 235, 237-238 (CA4 1992) (same), and the applicable standard for an appellate court's review of a district court's decision to stay a declaratory judgment action, compare, e.g., United States Fidelity & Guaranty Co. v. Murphy Oil USA, Inc., 21 F.3d 259, 263, n. 5 (CA8 1994) (reviewing for abuse of discretion); Christopher P. v. Marcus, 915 F.2d 794, 802 (CA2 1990) (same), with Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 936 (CA Fed 1993) (reviewing de novo); Cincinnati Ins. Co. v. Holbrook, 867 F.2d 1330, 1333 (CA11 1989) (same). We now affirm.

II

Over 50 years ago, in Brillhart v. Excess Ins. Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), this Court addressed circumstances virtually identical to those present in the case before us today. An insurer, anticipating a coercive suit, sought a declaration in federal court of nonliability on an insurance policy. The District Court dismissed the action in favor of pending state garnishment proceedings, to which the insurer had been added as a defendant. The Court of Appeals reversed, finding an abuse of discretion, and ordered the District Court to proceed to the merits. Reversing the Court of Appeals and remanding to the District Court, this Court held that, "[a]lthough the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction." Id., at 494, 62 S.Ct., at 1175. The Court explained that "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." Id., at 495, 62 S.Ct., at 1175-1176. The question for a district court presented with a suit under the Declaratory Judgment Act, the Court found, is "whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive

law, can better be settled in the proceeding pending in the state court." Ibid.

[2] Brillhart makes clear that district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. Although Brillhart did not set out an exclusive list of factors governing the district court's exercise of this discretion, it did provide some useful guidance in that regard. The Court indicated, ***2141** for example, that in deciding whether to enter a stay, a district court should examine "the scope of the pending state court proceeding and the nature of defenses open there." Ibid. This inquiry, in turn, entails consideration of "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." Ibid. Other cases, the Court noted, might shed light on additional factors governing a district court's decision to stay or to dismiss a declaratory judgment action at the outset. See ibid. But Brillhart indicated that, at least where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a district court might be indulging in "[g]ratuitous interference," ibid., if it permitted the federal declaratory action to proceed.

Brillhart, without more, clearly supports the District Court's decision in this case. (That the court here stayed, rather than dismissed, the action is of little moment in this regard, because the state court's decision will bind the parties under principles of res judicata.) Nonetheless, London Underwriters argue, and several Courts of Appeals have agreed, that intervening case law has supplanted Brillhart is notions of broad discretion with a test under which district courts may stay or dismiss actions properly within their jurisdiction only in "exceptional circumstances." In London Underwriters' view, recent cases have established that a district court must point to a compelling reason--which, they say, is lacking here--in order to stay a declaratory judgment action in

favor of pending state proceedings. To evaluate this argument, it is necessary to examine three cases handed down several decades after Brillhart.

In Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Government brought an action in Federal District Court under 28 U.S.C. § 1345 seeking a declaration of its water rights, the appointment of a water master, and an order enjoining all uses and diversions of water by other parties. See Pet. for Cert. in Colorado River Water Conservation Dist. v. United States, O.T. 1974, No. 74-940, pp. 39a-40a. The District Court dismissed the action in deference to ongoing state proceedings. The Court of Appeals reversed, 504 F.2d. 115 (1974), on the ground that the District Court had jurisdiction over the Government's suit and that abstention was inappropriate. This Court reversed again. Without discussing Brillhart, the Court began with the premise that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction conferred on them by Congress. Colorado River, supra, at 813, 817-818, 96 S.Ct., at 1244, 1246-1247, citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821). The Court determined, however, that a district court could nonetheless abstain from the assumption of jurisdiction over a suit in "exceptional" circumstances, and it found such exceptional circumstances on the facts of the case. 424 U.S., at 818-820, 96 S.Ct., at 1246-1248. Specifically, the Court deemed dispositive a clear federal policy against piecemeal adjudication of water rights; the existence of an elaborate state scheme for resolution of such claims; the absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss; the extensive nature of the suit; the 300-mile distance between the District Court and the sites of the water district at issue; and the prior participation of the Federal Government in related state proceedings.

Two years after Colorado River we decided Will v. Calvert Fire Ins. Co., 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978), in which a plurality of the Court stated that, while "'the

pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,'" id., at 662, 98 S.Ct., at 2557, quoting McClellan v. Carland, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed. 762 (1910), a district court is "'under no compulsion to exercise that jurisdiction,'" 437 U.S., at 662, 98 S.Ct., at 2557, quoting Brillhart, 316 U.S., at 494, 62 S.Ct., at 1175. Will concerned an action seeking damages for an alleged violation of federal securities laws brought in federal court during the pendency of related state ***2142** proceedings. Although the case arose outside the declaratory judgment context, the plurality invoked Brillhart as the appropriate authority. Colorado River, according to the plurality, "in no way undermine [d] the conclusion of Brillhart that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." Will, supra, 437 U.S., at 664, 98 S.Ct., at 2558. Justice Blackmun, concurring in the judgment, criticized the plurality for not recognizing that Colorado River had undercut the "sweeping language" of Brillhart. 437 U.S., at 667, 98 S.Ct., at 2560. Four Justices in dissent urged that the Colorado River "exceptional circumstances" test supplied the governing standard.

The plurality's suggestion in Will that Brillhart might have application beyond the context of declaratory judgments 'was rejected by the Court in Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In Moses H. Cone, the Court established that the Colorado River "exceptional circumstances" test, rather than the more permissive Brillhart analysis, governs a district court's decision to stay a suit to compel arbitration under § 4 of the Arbitration Act in favor of pending state litigation. Noting that the combination of Justice Blackmun and the four dissenting Justices in Will had made five to require application of Colorado River, the Court rejected the argument that Will had worked any substantive changes in the law. "'Abdication of the obligation to decide cases,'" the Court reasoned, "'can be justified ... only in the exceptional circumstance where the order to the parties to

repair to the State court would clearly serve an important countervailing interest.'" 460 U.S., at 14, 103 S.Ct., at 963, quoting Colorado River, supra, 424 U.S. at 813, 96 S.Ct., at 1244. As it had in Colorado River, the Court articulated nonexclusive factors relevant to the existence of such exceptional circumstances, including the assumption by either court of jurisdiction over a res, the relative convenience of the fora, avoidance of piecemeal litigation, the order in which jurisdiction was obtained by the concurrent fora, whether and to what extent federal law provides the rules of decision on the merits, and the adequacy of state proceedings. Evaluating each of these factors, the Court concluded that the District Court's stay of federal proceedings was, under the circumstances, inappropriate.

Relying on these post-Brillhart developments, London Underwriters contend that the Brillhart regime, under which district courts have substantial latitude in deciding whether to stay or to dismiss a declaratory judgment suit in light of pending state proceedings (and need not point to "exceptional circumstances" to justify their actions), is an outmoded relic of another era. We disagree. Neither Colorado River, which upheld the dismissal of federal proceedings, nor Moses H. Cone, which did not, dealt with actions brought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1988 ed., Supp. V). Distinct features of the Declaratory Judgment Act, we believe, justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the "exceptional circumstances" test of Colorado River and Moses H. Cone. No subsequent case, in our view, has called into question the application of the Brillhart standard to the Brillhart facts.

Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration," 28 U.S.C. § 2201(a) (1988 ed., Supp. V) (emphasis added). See generally E. Borchard, Declaratory

Judgments 312-314 (2d ed. 1941); Borchard, Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments, 26 Minn.L.Rev. 677 (1942). The statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface. See generally D. Shapiro, Jurisdiction and Discretion, 60 N.Y.U.L.Rev. 543 (1985); cf. O. Fiss & D. Rendleman, Injunctions 106-108 (2d ed. 1984) (describing courts' nonstatutory discretion, ***2143** through application of open-ended substantive standards like "irreparable injury," in the injunction context). We have repeatedly characterized the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 241, 73 S.Ct. 236, 239, 97 L.Ed. 291 (1952); see also Green v. Mansour, 474 U.S. 64, 72, 106 S.Ct. 423, 428, 88 L.Ed.2d 371 (1985); Cardinal Chemical Co. v. Morton International, Inc., 508 U.S. ---, ---, n. 17, 113 S.Ct. 1967, 1974 n. 17, 124 L.Ed.2d 1 (1993). When all is said and done, we have concluded, "the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." Wycoff, supra, 344 U.S., at 243, 73 S.Ct., at 240.

Acknowledging, as they must, the unique breadth of this discretion to decline to enter a declaratory judgment, London Underwriters nonetheless contend that, after Colorado River and Moses H. Cone, district courts lack discretion to decline to hear a declaratory judgment suit at the outset. See Brief for Petitioners 22 ("District courts must hear declaratory judgment cases absent exceptional circumstances; district courts may decline to enter the requested relief following a full trial on the merits, if no beneficial purpose is thereby served or if equity otherwise counsels"). We are not persuaded by this distinction. London Underwriters' argument depends on the untenable proposition that a district court, knowing at the commencement of litigation that it will exercise its broad statutory discretion to decline declaratory

relief, must nonetheless go through the futile exercise of hearing a case on the merits first. Nothing in the language of the Declaratory Judgment Act recommends London Underwriters' reading, and we are unwilling to impute to Congress an intention to require such a wasteful expenditure of judicial resources. If a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, it cannot be incumbent upon that court to proceed to the merits before staying or dismissing the action.

[3][4][5][6] We agree, for all practical purposes, with Professor Borchard, who observed half a century ago that "[t]here is ... nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court" to hear a declaratory judgment action. Borchard, Declaratory Judgments, at 313. By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. [FN2] In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

> FN2. We note that where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, insofar as it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy. See, e.g., P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1451, n. 9 (3d ed. 1988).

III

[7] As Judge Friendly observed, the Declaratory Judgment Act "does not speak," on its face, to the question whether discretion to entertain declaratory judgment actions is vested in district courts alone or in the entire judicial system. Friendly, Indiscretion about Discretion, 31 Emory L.J. 747, 778 (1982). The Court of Appeals reviewed the District Court's decision to stay London Underwriters' action for abuse of discretion, and found none. London Underwriters urge us to follow those other Courts of Appeals that review decisions to grant (or to refrain from granting) declaratory relief de novo. See, e.g., Genentech, Inc. v. Eli Lilly & Co., 998 F.2d, at 936; Cincinnati Ins. Co. v. Holbrook, *2144 867 F.2d, at 1333. We decline this invitation. We believe it more consistent with the statute to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp. Cf. First Options of Chicago, Inc. v. Kaplan, 514 U.S. ---, ---, 115 S.Ct. 1920, 1926, --- L.Ed.2d --- (1995) ("[T]he reviewing attitude that a court of appeals takes toward a district court decision should depend upon 'the respective institutional advantages of trial and appellate courts'") (citation omitted); Miller v. Fenton, 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) ("[T]he fact/ law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"). While it may be true that sound administration of the Declaratory Judgment Act calls for the exercise of "judicial discretion, hardened by experience into rule," Borchard, Declaratory Judgments, at 293, proper application of the abuse of discretion standard on appellate review can, we think, provide appropriate guidance to district courts. In this regard, we reject London Underwriters' suggestion, Brief for Petitioners 14, that review for abuse of discretion "is tantamount to no review" at all.

IV

In sum, we conclude that Brillhart v. Excess Ins. Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), governs this declaratory judgment action and that district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings. Like the Court of Appeals, we conclude only that the District Court acted within its bounds in staying this action for declaratory relief where parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court. The judgment of the Court of Appeals for the Fifth Circuit is

Affirmed.

Justice BREYER took no part in the consideration or decision of this case.

END OF DOCUMENT

(UNDERLINING EMPHASIS ADDED BY PETITIONER)